

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 Case No. 18-23538-RDD

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5 In the Matter of:

6
7 SEARS HOLDINGS CORPORATION,

8
9 Debtor.

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11
12 United States Bankruptcy Court

13 300 Quarropas Street, Room 248

14 White Plains, NY 10601

15
16 March 23, 2021

17 10:07 AM

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21 B E F O R E :

22 HON ROBERT D. DRAIN

23 U.S. BANKRUPTCY JUDGE

24
25 ECRO: JUSTIN WALKER

1 HEARING re Notice of Agenda of Matters Scheduled for
2 Telephonic Hearing on March 23, 2021 at 10:00 a.m.

3
4 HEARING re Motion for Relief from Stay filed by James P.
5 Pagano on behalf of Movants/Class Representatives Nina and
6 Gerald Greene (ECF #6212)

7
8 HEARING re Objection to Motion for Relief From Automatic
9 Stay (related document(s)6212) filed by Luke A Barefoot on
10 behalf of Transform SR LLC, Transform SR Protection LLC,
11 Transform Holdco LLC. (ECF #6366)

12
13 HEARING re Stipulation and Pre-Trial Scheduling Order Signed
14 on 3/2/2020 Among Transform Holdco LLC and Greene Class
15 Action Plaintiffs (related document(s)7313, 6212) (ECF
16 #9331)

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25 Transcribed by: Sonya Ledanski Hyde

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2

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22 BY: LUKE BAREFOOT (TELEPHONICALLY)

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P R O C E E D I N G S

THE COURT: Good morning. This is Judge Drain.

We're here in In re Sears Holdings Corporation. This is a telephonic conference today. You should keep your phone on mute unless you're speaking in light of that.

If you want to order a transcript, you should contact our Clerk's Office. Court Solutions provides the recording on a daily basis to the Clerk's Office for that purpose. I have the revised agenda for today's calendar, and unless I'm missing something, the only matter that's on the calendar is the final pre-trial conference in the motion of class representatives Nina and Gerald Green for relief from the automatic stay as previously provided for in the second pre-trial and scheduling order entered in connection with this matter on March 2nd and reflecting the last pre-trial conference that we had on the matter, which was on January 28th, 2021.

So unless someone wants to say anything in advance, so turning to that pre-trial conference, I'll turn to that pre-trial conference.

MS. MARCUS: Good morning, Your Honor. This is Jacqueline Marcus from Weil, Gotshal and Manges on behalf of Sears Holdings and its affiliates. You're correct, Your Honor, that's the only matter that's on the calendar this morning.

1 THE COURT: Okay. Very well. So why don't I take
2 the appearances of Counsel in that conference?

3 MR. MATHER: Good morning, Your Honor. It's Ben
4 Mather and Janice Daul from Kaufman, Coren & Ress on behalf
5 of the class representatives.

6 THE COURT: Good morning.

7 MR. BAREFOOT: Good morning, Your Honor. Luke
8 Barefoot from Cleary, Gottlieb, Steen & Hamilton for
9 Transform Holdco and its affiliates.

10 THE COURT: Okay, good morning. All right, I'm
11 assuming because March 2nd was fairly recently, that the
12 parties did complete the two depositions and that there's no
13 more discovery to be had on this matter?

14 MR. BAREFOOT: Your Honor --

15 MR. MATHER: Your Honor --

16 MR. BAREFOOT: Go ahead, Mr. Mather. Apologies.

17 MR. MATHER: Thank you, Mr. Barefoot. We
18 completed one yesterday and we have the other scheduled for
19 next week.

20 THE COURT: Okay, very well. And that's the only
21 discovery, unless I guess that deposition raises some brand
22 new issue.

23 MR. MATHER: That's correct. Excuse me. Ben
24 Mather -- that's correct, Your Honor.

25 THE COURT: All right. So as contemplated by the

1 March 2nd order, unless this matter isn't resolved
2 beforehand, the next step before me at least will be an
3 evidentiary hearing on May 4th?

4 MR. MATHER: Ben Mather, that's correct, Your
5 Honor.

6 THE COURT: Okay. And the order already lays out
7 how the parties would proceed in advance of that hearing in
8 terms of providing each other and the Court with witness
9 declarations and exhibit books. Hopefully exhibit books
10 that are agreed as to the admissibility of the exhibits
11 without any disputes, but obviously the parties have leeway
12 to raise disputes as to admissibility of the exhibits and/or
13 portions of the declarations under that order.

14 There's also to be some briefing before the
15 evidentiary hearing. As to the schedule on any of that,
16 have there been any changes from what's set out in the March
17 2 order?

18 MR. MATHER: Ben Mather. No, Your Honor, there
19 have been no changes.

20 THE COURT: Okay, very well. So I think we're all
21 set to go on this. I had anticipated that I might get an
22 argument from one side or the other or both, that the plain
23 meeting of the APA and the sale order precludes the
24 admission of any parole evidence. I don't know if that's
25 still contemplated or whether the parties have basically

1 accepted between themselves that they'll put the evidence
2 before me as well, and I can rule based on the document
3 alone. Or, the document plus the evidence?

4 MR. MATHER: Ben Mather, Your Honor --

5 MR. BAREFOOT: Your Honor, Luke Barefoot -- go
6 ahead, Mr. Mather. I apologize.

7 MR. MATHER: That's okay, Mr. Barefoot. Your
8 Honor, Ben Mather. We intend, as the class representatives,
9 to still make that argument.

10 THE COURT: Okay. The plain meaning argument?

11 MR. MATHER: Yes.

12 THE COURT: Okay. And I'm assuming that Transform
13 does also?

14 MR. BAREFOOT: Luke Barefoot for Transform, Your
15 Honor. That's correct. I believe that both Plaintiffs and
16 Transform will argue in the first instance, that you can
17 resolve this based on the plain meaning of the APA and the
18 sale order, but that to the extent you find an ambiguity in
19 the document, the parole evidence will be before you and you
20 can alternatively rule on that basis.

21 THE COURT: Okay. All right. Very well. I guess
22 the only other thing I would want to discuss, but would
23 either of you are free to discuss, you know, if you want to
24 discuss, too, is the trial itself. May 4th is a ways off.
25 And it's conceivable to me that the parties participating in

1 the trial at that point will be comfortable doing it in
2 person given, you know, the state of vaccinations.

3 But if they are not, if a witness or Counsel has
4 not been fully vaccinated or is for some other reason that
5 is a good one, wary of appearing in person, I'm happy to do
6 it by Zoom, unless we switch to another remote platform by
7 then.

8 And I have procedures that are, I think well
9 developed and established at this point for Zoom evidentiary
10 hearings, which Mr. Andino from the Clerk's Office can go
11 through with the trial counsel. Are you -- have you all
12 discussed whether you would do this in person or remotely?

13 MR. MATHER: Ben Mather, Your Honor. We have not
14 discussed that as of today. We've -- the class
15 representatives are certainly open to discussing the
16 logistics of that and the possibility of doing this in
17 person. I think all things being equal, that would be our
18 preference.

19 THE COURT: Okay.

20 MR. BAREFOOT: Your Honor, Luke Barefoot from
21 Cleary. Mr. Mather is correct. We've not discussed that
22 and didn't realize that the Court would be open to that. I
23 will say I myself am not yet vaccinated and not yet eligible
24 to be vaccinated. I'm not sure of the status of our one
25 witness.

1 I did want to highlight for the Court just the
2 change in circumstance between the time we filed the
3 original motion and the current, with respect to Mr. Ricker,
4 who Your Honor, who has testified before Your Honor numerous
5 times.

6 Mr. Ricker is no longer employed by Transform, and
7 is so no longer in Transform's control. And given his
8 location, is unavailable for trial. So his testimony will
9 be preceding the deposition designations. Mr. Kumani will
10 be available to testify in person and be cross-examined.

11 I'm not sure of Mr. Kumani's vaccination status or
12 his comfort with traveling to New York, but I can -- we will
13 undertake to discuss that with the Plaintiffs, and we can
14 report back to Your Honor's chambers.

15 THE COURT: Okay. All right. Well, I want to be
16 clear. I, at this point, am prepared to have an in-person
17 trial only if the parties participating in that trial are
18 vaccinated and it's clear that traveling to the Court is
19 within, you know, recommended safety parameters by the CDC.

20 And again, I'm not going to have someone
21 quarantine for two weeks to come to this hearing. I don't
22 know if that type of quarantine will be in place at that
23 time, but I think all things considered, people probably
24 should be planning on a Zoom trial, which I could tell you
25 has worked fine I think without complaints by people.

1 Having done it now several times, it's -- it
2 actually proceeds remarkably like a trial, particularly
3 given the pre-trial procedures that I've always required,
4 and that are in place under the March 2nd order.

5 So I think the parties should be assuming in all
6 likelihood that we'll have a Zoom trial unless the public
7 health guidance and requirements for New York State and
8 wherever the witness would be traveling from regarding
9 quarantine are essentially lifted.

10 MR. MATHER: Ben Mather, Your Honor. Understood.

11 THE COURT: Okay. All right, so again, you should
12 reach out to Mr. Andino, the two of you, or Ms. Daul. And
13 Mr. Barefoot should reach out to Mr. Andino a week or so, 10
14 days just to a week or so before the trial so that he can go
15 through with you the preparation for it, which is relatively
16 simple, again. And of course, if you resolve the matter,
17 let chambers know so we can release that day.

18 MR. MATHER: Will do, Your Honor.

19 THE COURT: Okay, very well.

20 MR. BAREFOOT: (indiscernible) --

21 THE COURT: Anything else, either on this pre-
22 trial or in connection with the Sears generally? Okay,
23 hearing no one, I'll ring off at this point. Thanks,
24 everyone.

25 MS. MARCUS: Thank you, Your Honor.

1 MR. BAREFOOT: Thank you, Your Honor.

2 MR. MATHER: Thank you, Your Honor.

3 (Whereupon these proceedings were concluded at
4 10:19 AM)

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C E R T I F I C A T I O N

I, Sonya Ledanski Hyde, certified that the foregoing
transcript is a true and accurate record of the proceedings.

Sonya Ledanski
Hyde

Digitally signed by Sonya Ledanski
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Date: March 25, 2021

[& - discuss]

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